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No. 85-1158

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LARRY CRAWFORD, *et al.*,
Petitioners,
v.
UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF RESPONDENTS UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC, *et al.*, IN OPPOSITION

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This case does not merit plenary consideration by this Court.

1. Petitioners challenge the decision of the Supreme Court of Virginia reversing a trial court judgment which had held several striking employees and their union liable to certain of their fellow employees who had continued to work during the strike, solely because the former had called the latter by the epithets "cocksucker" and "motherfucker." A plurality of the Supreme Court of Virginia held that this "relief . . . based on pure speech, not con-

duct, but speech—standing alone" (App. 15)[1] was precluded by this Court's decisions in *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966), and *Letter Carriers v. Austin*, 418 U.S. 264 (1974). Justice Cochran, whose vote was essential to the disposition of the case, "reach[ed] the same result . . . solely by application of Virginia law" (App. 37a).

The plurality opinion represents a straightforward application of settled law. *Linn* and *Austin* hold, on the basis of federal labor policy, that a State may not punish a party to a labor dispute for his "intemperate, abusive, or insulting language" (*Austin* at 283), or even for "the most repulsive speech" (*Linn* at 63), unless it is shown that the defendant made "defamatory statements . . . with knowledge of their falsity or with reckless disregard of whether they were true or false. . . ." (*Linn* at 65). Accord, *Farmer v. Carpenters*, 430 U.S. 290, 299 (1977). Under that test, which petitioners concede should be applied here (Pet. 10), "[t]he *sine qua non* of recovery . . . is the existence of falsehood. . . . Before the test of reckless or knowing falsity can be met, there must be a false statement of fact" (*Austin* at 283-284).

In applying that test, the plurality merely held that the use of the epithets "cocksucker" and "motherfucker" "cannot reasonably be understood, under the circumstances of this labor dispute, to convey a false representation of fact" (App. 23a-24a). See also App. 37a (Cochran, J., concurring) (applying the same analysis as a matter of Virginia law). The Virginia Court found those epithets to constitute rhetorical hyperbole and not to have been intended or understood as representations of fact. The Virginia Court's fact-bound determination as to the nature of these statements, which would not in any event

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[1] References to "App." are to the Appendix to the Petition for a Writ of Certiorari. References to "Pet." are to the Petition.

warrant review by this Court, was plainly correct and consistent with established decisional law.[2]

2. Petitioners assert that they were the victims of "acts of outrageous conduct and threats of physical and emotional abuse" (Pet. 3-4). But petitioners' claims based on this alleged conduct were rejected by both State courts solely as a matter of Virginia law.

The very trial court judgment which petitioners seek to reinstate (Pet. 13) rejected those claims. The Supreme Court of Virginia accurately described the relevant portion of the trial court's decision:

> After considering extensive and conflicting testimonial evidence, the trial court rejected virtually all of plaintiffs' contentions . . . [and] ruled . . . that there was no violation of Code §§ 40.1-53, 40.1-66, or 40.1-67, which concern picketing and right to work; that there was no intentional infliction of emotional distress; [and] that there was no assault and battery . . . [App. 3a].

Those determinations were affirmed by the Supreme Court of Virginia, solely on state-law grounds (App. 24a-27a).[3]

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[2] See *Austin*, *supra*, at 284-286 (statement referring to a strikebreaker as a "traitor" was "merely rhetorical hyperbole," not a false statement of fact); *Greenbelt Publishing Assn. v. Bresler*, 398 U.S. 6, 14 (1970) (accusation that a real estate developer was engaging in "blackmail" was "no more than rhetorical hyperbole," not a false statement of fact); *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344, 348 (5th Cir. 1966) (article referring to members of state police as 'bastards" was not a false statement of fact; "it is perfectly apparent that these words were used as mere epithets, as terms of abuse and opprobrium").

[3] Petitioners therefore err in suggesting that this case presents any question as to the application of *Farmer v. Carpenters*, *supra*. In *Farmer* this Court held that in certain circumstances a State may punish conduct, occurring in connection with a labor dispute, which is "so outrageous that 'no reasonable man in a civilized society should be expected to endure it.'" *Id.* at 302, quoted at Pet. 11. Virginia law recognizes such a cause of action (*Womack v. Eldridge*,

Thus, this is not a case in which claims based on "acts of outrageous conduct and threats of physical and emotional abuse" (Pet. 3-4) were held to be preempted by federal law. Rather, petitioners' claims in this regard were rejected by both the trial court and the Supreme Court of Virginia solely on state-law grounds, and petitioners could not challenge that disposition in this Court.[4]

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215 Va. 338, 210 S.E.2d 145 (1974)), and petitioners asserted that cause of action in the trial court. But the trial judge found against petitioners on "factual" grounds (App. 27a), determining "that there was no intentional infliction of emotional distress" in this case (App. 3a). The Supreme Court of Virginia affirmed the trial court's determination that "the plaintiffs did not prove their case on this issue" under the standards of Virginia law as defined in *Womack v. Eldridge*, *supra* (App. 27a). Thus, no federal question is presented by the Virginia Court's rejection of petitioners' claims of "outrageous conduct."

So too, while petitioners continue to assert that respondents' conduct violated § 40.1-53 of the Code of Virginia (Pet. 6, 8), the Virginia Court rejected that claim on the ground that the Code provision invoked by petitioners does not authorize a private action for damages (App. 24a-25a).

[4] Nor, in any event, is such a challenge fairly encompassed by petitioners' Question Presented. The petition questions only "[w]hether the decision . . . reversing the award by the trial court . . . of . . . damages for use of insulting words [was erroneous]." Pet. i. See also *id.* at 13 (concluding that "the . . . damage award of the trial court for use of insulting words under the applicable Virginia statute should be . . . reinstated by this Court"). The petition does not question the rulings of the Supreme Court of Virginia on the claims that had been *rejected* by the trial court.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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